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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1065

ALLEN LEVAIR JORDAN and
ALVINA LAJAN JOHNSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

Petition for Rehearing

EDWARD L. CRAGEN
555 Polk Street
San Francisco, California 94102
For Petitioners

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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This Petition for Rehearing is respectfully sought after denial of certiorari on February 16, 1970, and is confined to intervening circumstances of substantial effect: A new and conflicting split decision by another court of appeals. (Rule 58; *Land v Dollar,* 343 US 973, 341 US 737, 738; *Reid v Covert,* 352 US 901, 354 US 1; *Remmer v US,* 348 US 904).

THE EFFECT OF BENTON v MARYLAND, 395 US 784, AND AN INDICATION THAT A STRONG CASE FOR ABOLITION OF CONCURRENT SENTENCE DOCTRINE MAY BE MADE ON DIRECT APPEALS SPLIT THE 2d CIRCUIT IN A 4-COUNT HEROIN TRANSFER CONVICTION, 1/8/70, FEBRE v U.S.

After concluding that Febre could not be found actually or constructively to have possessed the narcotics which led to his convictions on counts three and four of the indictment, Judge Kaufman disagreed with Judge Hays, who wrote:

"I agree with Judge Kaufman that the conviction on counts three and four must be reversed. I disagree on the consequences of that reversal. In my opinion the case should be remanded for a new trial on counts two and five.

"While Benton v Maryland does not expressly rule out for all purposes the concurrent sentence doctrine, it manifests such basic dissatisfaction with the doctrine as to suggest that its total elimination merely awaits a proper case. And, as Judge Kaufman notes, the Court in Benton says that

> 'A stronger case for abolition of the concurrent sentence doctrine may well be made in cases on direct appeal, as compared to convictions attacked collaterally by suits for post-conviction relief.' 395 US at 793, footnote 11.

"The effect to be given Benton must, it seems to me, require a change in our rule from one providing that in the case of concurrent sentences, the questioned conviction on one count will not be considered unless it can be shown that the defendant would be prejudiced if the conviction was unjustified, see *U.S. v Barash,* 365 Fed2d 395 (1966) **to one providing that prejudice will be presumed unless**

it is clearly shown that in fact no prejudice would result. (Emphasis added) See *U.S. ex rel. Weems v Follette,* 414 Fed2d 417 (1969).

"Not only do I disagree with Judge Kaufman's view that a lighter sentence could not possibly result from a remand for resentencing, but I would go much farther than is suggested by Judge Kaufman's opinion and would remand for a new trial **on the ground that the jury may well have been influenced with respect to counts two and five by "spill over" of the evidence as to counts three and four, and by the fact that the court's sending the evidence on counts three and four to the jury gave the jury the right to find appellant guilty on the most tenuous evidence.**

"We are quick to reverse a conviction on the ground of prejudice where evidence of defendant's commission of other crimes has been introduced. How can we consistently hold that the introduction of wholly insufficient evidence of other crimes in the present case did not unfairly prejudice defendant's case?" (Emphasis added)

The Hirabayashi doctrine allows no room for constitutional error within *Chapman v California,* 386 US 18, and *Fahy v Connecticut,* 375 US 85. Benton was urged, rejected and Hirabayashi applied in the instant direct appeal from the 9th circuit. At that time there was no possibility of securing the conflict of decisions necessary to a review of this decision rejecting *Benton* on direct appeal. This decision is appropriate for review as is *Febre* raising the identical issue also on direct appeal, and Judge Haye's opinion is in direct conflict with this one in which review was denied. Hence the desirability of vacating the denial and granting certiorari is most compelling, while the Court still has jurisdiction of this case. *U.S. v Ohio Power Co.,* 353 US 98; *Helvering v Sprouse,* 316 US 656.

CONCLUSION

Rehearing should be granted in light of the intervening and conflicting decision from another court of appeals, *Febre v U.S.*, CA 2, January 8, 1970, 6 CrL 2348, 2349, 2/18/70.

Dated: March 10, 1970

Respectfully submitted

EDWARD L. CRAGEN
Counsel For Petitioners